

FOR MAIL ROOM

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Amendment of Section 73.202(b),) MB Docket No. 04-401
Table of Allotments,) RM-11095
FM Broadcast Stations.)
(Durant, Oklahoma and Tom Bean, Texas))
)

NOTICE OF PROPOSED RULE MAKING**Adopted: October 20, 2004****Released: October 25, 2004****Comment Date: December 16, 2004****Reply Comment Date: December 31, 2004**

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a petition for rule making filed by NM Licensing, LLC ("Petitioner"), licensee of Station KLAQ(FM), Durant, Oklahoma, proposing the reallocation of Channel 248C2 from Durant, Oklahoma to Tom Bean, Texas, as that community's first local service, and the modification of Station KLAQ(FM)'s license accordingly. Petitioner pledges to file an application to implement this reallocation.

2. Petitioner filed this proposal for reallocation in accordance with the provisions of Section 1.420(i),¹ which permits the modification of a station's license to specify a new community of license while not affording other interested parties the opportunity to file competing expressions of interest in the proposed allotment.² In considering a reallocation proposal, we compare the existing allotment to the proposed allotment to determine whether the reallocation will result in a preferential arrangement of allotments. This determination is based upon the FM Allotment priorities.³

3. In support of the petition, Petitioner states that its proposal would result in a preferential arrangement of allotments, and meets the requirements for reallocation set forth in *Change of Community R&O*. First, the allotment of Channel 248C2 at Tom Bean is mutually exclusive with the current use of Channel 248C2 at Durant. Second, the community of Durant would not be deprived of its only local service.⁴ Third, the proposal would provide a first local aural transmission service at Tom Bean, under Priority three. As a result of the proposed reallocation, Petitioner states that there will be a net gain in

¹ 47 C.F.R. §1.420(i).

² See *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O")*, 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990).

³ See *Revision of FM Assignment Policies and Procedures*, 90 FCC2d 88, 91 (1988). The FM Allotment priorities are: (1) first full-time aural service, (2) second full-time aural service, (3) first local service, (4) other public interest matters. [Co-equal weight is given to priorities (2) and (3)].

⁴ Stations KSEO(AM), KAYC(FM), KSSU(FM), and KLBC(FM) will remain in Durant.

service to some 289,989 persons. Moreover, the entire loss area created by the proposal will continue to receive in excess of five aural services according to Petitioner.⁵

4. Petitioner also states that Tom Bean is a community for allotment purposes, and that it is not located within any Urbanized Area. Although the proposed facility at Tom Bean will provide 70 dBu service to 99% of the Sherman, Texas Urbanized Area, Petitioner asserts that a Tuck analysis⁶ is not required because the existing facility at Durant already provides 70 dBu service to 100% of the Sherman Urbanized area.⁷ Petitioner also notes that the proposed facility at Tom Bean will provide 70 dBu service for the first time to 27% of the McKinney, Texas Urbanized Area which falls short of the 50% coverage trigger for a Tuck analysis. Petitioner provides a Tuck analysis to demonstrate that Tom Bean is entitled to consideration as a first local service. In support of this contention, Petitioner states that Tom Bean is incorporated and is listed in the 2000 U.S. Census, with a population of 941 persons. Petitioner also states that Tom Bean has its own zip code (75489) and post office, city government including a city hall, a mayor and city council, police and fire departments, school system, and numerous businesses and churches.

5. We believe that the proposal warrants consideration because it would provide Tom Bean with a first local aural transmission service without depriving Durant of its sole local transmission service. Channel 248C2 has been proposed to be reallocated at Tom Bean at coordinates 33-28-52 NL and 96-32-03 WL with a site restriction 6.4 kilometers (4 miles) southwest of the community.⁸

6. Accordingly, we seek comment on the proposed amendment of the FM Table of Allotments, Section 73.202(b),⁹ for the communities listed below, to read as follows:

<u>Community</u>	<u>Present</u>	<u>Channel</u>	<u>Proposed</u>
Durant, Oklahoma	248C2, 292C3		292C3
Tom Bean, Texas	---		248C2

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached *Appendix* and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the *Appendix* before a channel will be allotted.

⁵ The Commission has considered five or more services to be "abundant." *Family Broadcasting Group*, 53 RR 2d 662 (Rev. Bd. 1983), *rev. denied* FCC 83-559 (Comm'n Nov. 29, 1983); *see also LaGrange and Rollingwood, Texas*, 10 FCC Rcd 3337 (1995).

⁶ *See Headland, Alabama, and Chatahoochee, Florida*, 10 FCC Rcd 10352 (MMB 1995).

⁷ Petitioner citing *Dayton, Nevada et al.*, 15 FCC Rcd 22461 (MMB 2000); *St. Maries, Idaho et al.*, 14 FCC Rcd 17012 (MMB 1999); *Boulder, Colorado et al.*, 12 FCC Rcd 583 (MMB 1997).

⁸ The proposed allotment of Channel 248C2 at Tom Bean conflicts with a prior counterproposal in MM Docket No. 00-148, advanced on behalf of Petitioner for Station KLAX, but which was dismissed. *See Quanah, Texas et al.*, 18 FCC Rcd 9495 (MB 2003) *aff'd on recon.* 19 FCC Rcd 7159 (MB 2004), *app. for review pending*. The dismissed counterproposal proposed to substitute Channel 248C for Channel 248C2 at Durant and to reallocate Channel 248C to Keller, Texas and to modify Station KLAQ's license accordingly. The Petitioner has not sought reconsideration or review of that action. In lieu of its earlier proposal, Petitioner now proposes a reallocation to Tom Bean.

⁹ 47 C.F.R. § 73.202(b).

8. Pursuant to Sections 1.415 and 1.419,¹⁰ interested parties may file comments or counterproposals on or before December 16, 2004, and reply comments on or before December 31, 2004, and are advised to read the *Appendix* for the proper procedures. Comments should be filed with the Federal Communications Commission, Office of the Secretary, 445 Twelfth Street, SW, TW-A325, Washington, D.C. 20554. Additionally, a copy of such comments should be served on Petitioners' counsel, as follows:

M. Scott Johnson, Esquire
Fletcher, Heald & Hildreth PLC
1300 North 17th Street, 11th Floor
Arlington, Virginia 22209-3801

9. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistrionix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail or Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to a rule making proceeding to amend the FM Table of Allotments, Section 73.202(b).¹¹ This document does not contain [new or modified] information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* Section 3506(c)(4).¹²

11. For further information concerning this proceeding, contact Helen McLean (202) 418-2738. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a *Notice of Proposed Rule Making* until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioners constitutes an *ex parte* presentation and shall not

¹⁰ 47 C.F.R. §§ 1.415 and 1.419.

¹¹ *See Certification that Section 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Makings to Amend 47 C.F.R. Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules.* 46 FR 11549 (Feb. 9, 1981).

¹² 44 U.S.C. § 3506(c)(4).

be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief
Audio Division
Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority found in 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b), and 47 C.F.R. Sections 0.61, 0.204(b) and 0.283, IT IS PROPOSED TO AMEND the FM Table of Allotments, 47 C.F.R. Section 73.202(b), as set forth in the *Notice of Proposed Rule Making* to which this *Appendix* is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this *Appendix* is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding:

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments (*see* 47 C.F.R. Section 1.420(d).)

(b) Petitions for rule making which conflict with the proposals in this *Notice* will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; service. Pursuant to applicable procedures set out in 47 C.F.R. Sections 1.415 and 1.420, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this *Appendix* is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. The person filing the comments shall serve comments on the petitioners. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. A certificate of service shall accompany such comments and reply comments (*see* 47 C.F.R. Section 1.420(a), (b) and (c).) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of 47 C.F.R. Section 1.420, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Information Center, at its headquarters, 445 12th Street, S.W., Washington, D.C.